IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 629 of 2007

In

Notice of Motion No.1513 of 2007

In

S.C.Suit No.4993 of 2004

Shri Chandrakant Anant Nakharekar .. Appellant

V/s

Sunil Sitaram Kurnekar and Ors. ..Respondents

Shri D.B.Sawant for the Apellant

Harish R Pawar for Respondent no.1

CORAM:S.R.SATHE,J.

DATED:11th Sept. 2007

P.C.:-

1. The Appellant original defendant no.4 in SC Suit No.4993 of 2004 has preferred this appeal against the order passed by the Judge, City Civil Court, Bombay in Notice of Motion No.1513 of 2007 whereby the

plaintiff's application for mandatory injunction directing the defendants to vacate the suit premises i.e. Flat No.nil, admeasuring 430 sq.ft. on the ground floor of A Wing situated in New Survey No.2/2569, Parel Sewree Division, Lalbaug, Mumbai was allowed and restored the position of the suit premises observed in the order dated 27-10-2004.

2. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and defendants.

. Brief facts giving rise to this appeal are as under :-

3. It is the case of the plaintiff Sunil Tukaram Kurnekar that his father was in possession of a single room tenanment admeasuring 430 sq.ft. bearing room no.21 in building known as Bhagirthi Bhavan situated at 47 Ganesh Lane, Lalbaug, Mumbai as a tenant at monthly rent of Rs.66.04. The father of the defendant no.4 Anant Nakharekar was the husband of plaintiff's father's sister. As Anant had no accommodation to stay in Bombay he being the brother-in-law, plaintiff's father allowed him to stay in room no.21 along with him as a gratuitous licensee. After the death of plaintiff's father plaintiff became tenant of the said room no.21 and

rent receipt was also issued in his name. Even after the death of the father of the defendant no.4 present plaintiff allowed the defendant no.4 to reside in room no.21 as a gratuitous licensee.

4. Some time in the year 1991 defendant no.1 company purchased the building Bhagirthi Bhavan. Defendant nos 2 and 3 are the directors of the said company. After purchase of the said property the defendant nos.1 to 3 approached the plaintiff and requested him for joining redevelopment scheme. They offered to provide to plaintiff an area of about 430 sq,.ft. as permanent alternate accommodation in proposed new building on the suit plot. The defendant no.4 came to know about this. Then he started claiming independent rights in the tenanted premises by saying that he is a joint tenant. Not only that but he started contacting the defendant nos.1 to 3. Plaintiff, therefore revoked the license of the defendant no.4 and called upon him to vacate the suit premises. In spite of revocation of license the defendant no.4 did not vacate the premises and on the contrary he filed RAD Suit NO.1781 of 2000 in the Small Causes court, Mumbai against the present plaintiff and defendant no.1 for declaration of his alleged tenancy rights in respect of room no.21. The defendant nos.1 to 3 were however convinced about the false claim made by the defendant no.4 and they

therefore finalised their proposal regarding alternation accommodation with the present plaintiff and accordingly entered into an agreement with him on 15-3-2001. In RAD suit No.1781 of 2000 the defendant no.4 filed an Injunction Notice No.200 of 2001 and the same was granted in favour of the defendant no.4 and plaintiff and defendant no.1 were directed not to dispossess the defendant no.4 from tenanted premises without following due process of law. The defendant nos.1 to 3 thereafter started insisting the plaintiff to hand over tenament of Room No.21 for redevelopment. As the defendant no.4 did not vacate room no.21, plaintiff filed SC Suit No.3974 of 2002.

5. According to the plaintiff in October 2002 defendant nos.1 to 3 informed the plaintiff that they have arrived at a amicable settlement that defendant no.4 would shortly vacate the tenanted premises. so, plaintiff should also vacate the tenanted premises. Plaintiff told the defendants 1 to 3 that he would vacate the premises only after the decision of RAD Suit No.1781 of 2000 and SC suit no.3974 of 2002 and defendant no.4 leaving the suit premises. Defendant nos.1 to 3 told the plaintiff that as they have settled the matter with the defendant no.4 if plaintiff vacates the premises it would amount to handing over of tenanted premises. So, on 22-10-2002 plaintiff vacated the suit premises and shifted in

the transit accommodation provided by defendant nos.1 to 3 and the plaintiff received the key of the transit accommodation and letter to that effect was also written by the plaintiff to defendant nos.1 to 3 and the defendants confirmed having received the possession of the tenanted premises.

6. In the meantime the plaintiff had moved Notice of Motion for ad-inteirm relief in S.C.Suit No.3974 of 2002. In that suit the Judge, City Civil Court, Bombay appointed court Commissioner directing him to visit the suit site and submit report on the point of area of each part of the suit premises and existence of the partition while in the suit premises and parties were directed to extend status quo in respect of the suit premises till further orders. Accordingly the court commissioner visited the said premises in presence of the parties and submitted the report stating therein that the entire suit block is a self contained block and there is no partition well in the said block and easy access is available to all 3 rooms. The report was submitted on 27-10-2004 and the Judge, City Civil Court, directed to extend status quo in respect of the said position wherein the Judge specifically observed that neither the plaintiff nor defendant no.4 are in possession of the suit block. Both the parties did not file any say to Commissioner’s report and did not dispute the

correctness of the report. Nor they challenged the order passed by the Court on 27-10-2004.

7. On 27-6-2005 the said Notice of Motion filed by the plaintiff was dismissed for default. On the same day the Advocate for the plaintiff filed an application for setting aside dismissal order and Notice of Motion was restored on 2-9-2005.

8. The defendant no.4 filed Decl. suit bearing RAD suit No.419 of 2005 against the defendant no.1 and plaintiff in small Causes court at Bombay for declaration that he is a tenant in respect of the suit premises and prayed for direction to defendant no.1 that he should put him (present defendant no.4) in possession of ground floor premises admeasuring 430 sq.ft. in newly constructed building.

9. Thereafter as the present plaintiff did not appear in the said RAD suit No.419 of 2005, the present defendant no.4 deleted the plaintiff's name and said suit proceeded only against defendant no.1. The said suit ultimately was decided exparte and the decree was passed in favour of the present defendant no.4 on 25-8-2006 that defendant no.1 should hand over possession of the premises on ground floor admeasuring 220 sq.ft. When Bailiff went to execute the said decree, premises was found locked. Hence

the court passed the order to open the lock and hand over the possession and accordingly present defendant no.4 secured the possession of block situated on the ground floor in the newly constructed building. When plaintiff came to know about this, he made enquiry and he found that defendant no.4 had suppressed all the material facts from the Small Causes court,Mumbai and obtained exparte decree. Hence plaintiff filed Notice of Motion No.1513 of 2007 for issuing mandatory injunction against the defendants to vacate the suit premises and maintain the situation as mentioned in the order dated 27-10-2004 passed by the Judge, City Civil Court.

10. The defendant no.4 opposed the said relief claimed by the plaintiff and contended that he secured possession on the basis of the decree and order of status quo was not in existence when he filed RAD suit No.419 of 2005. According to him, though Notice of Motion was restored there was no specific order for restoration of status quo. According to the defendant if plaintiff was aggrieved by the decree passed by the Small Causes court and execution of the said decree, the plaintiff ought to have moved the Small Causes court by filing application under Order 21 Rule 97 or Rule 99 of Code of Civil Procedure. He also contended that under the circumstances of the case the Court should not pass

injunction of mandatory nature.

11. After hearing both the learned Advocates the learned Judge, City Civil Court, Bombay came to the conclusion that the status quo order granted earlier came to be revived on restoration of Notice of Motion, so, the said order was in operation when the defendant no.4 filed RAD Suit No.419 of 2005 and it was also in operation when the exparte decree was passed. According to the learned trial Judge the defendant no.4 suppressed the material fact of status quo from the Judge of the Court of small Causes and obtained the decree. Thus, according to him the defendant no.4 practiced fraud though he was to get possession of only 220 sq.ft. as per decree passed by the Small Causes court, he secured an area of about 440 sq.ft. The learned trial Court therefore held that the plaintiff has made out a prima facie case for granting mandatory injunction. He, therefore, allowed Notice of Motion and directed the defendant no.4 to vacate the suit premises and restore the position as mentioned in the order passed by the Judge of city Civil Court,Bombay on 27-10-2002.

12. The above mentioned order passed by the learned Judge of City Civil Court, Bombay is challenged in the present appeal by defendant no.4.

13. In this appeal before me Shri D.B.Sawant,learned Advocate for the appellant defendant no.4 submitted that though Notice of Motion was restored the order with regard to status quo was not revived, so it cannot be said that the defendant no.4 had suppressed entire material fact from the small Causes court. Secondly,he canvassed before me that if the plaintiff was aggrieved by the order passed and execution of the decree he ought to have moved the Small Causes court by filing application under Order 21 Rule 97 or Rule 99 of Code of Civil Procedure. Under the facts of the case the order passed by the learned Judge, city Civil Court, Bombay is not legal and valid.

14. As against this, Shri Harish Pawar, learned Advocate for the plaintiff submitted that order of status quo was automatically revived on restoration of Notice of Motion and it was abundant duty of the defendant no.4 to bring this fact to the notice of Small Causes court. He, however joined hands with builder and deliberately deleted the name of the plaintiff from the said suit and obtained ex-parte decree. He also submitted that refusing to grant relief against the defendant no.4 would amount to allowing him to remain in possession of the suit premises by playing fraud. He, therefore, submitted that appeal be dismissed.

15. At this stage it is in fact not necessary for me to go into the issue as to whether the original tenanted premises which are admittedly standing in the name of the present plaintiff as a tenant were actually taken on lease by him alone or whether the present defendant no.4 was also a co-tenant or joint tenant in the said premises. The fact that the defendant no.4 and even his father were residing in the suit premises is not disputed. But according to the plaintiff they were residing as a gratitudes licensee. At no point of time they had taken any objection for the rent receipt which was admittedly in the name of plaintiff's father and after his death in the name of the plaintiff. It is also an admitted fact that the defendant nos.1 to 3 had agreed to provide alternate accommodation to plaintiff not only that but from perusal of the record it appears that the plaintiff had in fact handed over the possession of the tenanted premises to the defendant builder and secured transit accommodation given by the builder. However, there is no document before me to indicate as to how and under what circumstances the defendant no.4 vacated the tenanted premises. But that point is also not so material while deciding the present appeal.

16. It is not in dispute that on 27-10-2004 the

Court Commissioner had visited the new building and inspected the flat on the ground floor which was to be allotted to the plaintiff. Admittedly, at that time there was no partition in the said block. It thus appears that defendant no.4 has secured possession of the said flat. It is pertinent to note that though in the suit defendant no.4 had claimed possession of portion amdeasuring 440 sq.ft. the decree was passed only in respect of 220 sq.ft.. Even then it does appear that the defendant no.4 has actually secured possession of 440 sq.ft. It was in fact the duty of the defendant no.4 to point out to the court that the flat in question is in fact admeasuring 440 sq.ft. Of course, now the defendant no.4 is trying to say that he is in possession of 220 sq.ft. This stand is probably taken after realising that the decree was only to the extent of only 220 sq.ft. One is at a loss to know as to how the said block was divided and area of 220 sq.ft. area was carved out.

17. At this stage it is in fact not disputed that both the parties to the litigation namely plaintiff and defendant no.4 were residing in original tenanted premises for long time. It is also very clear that when the defendant no.4 filed suit in the Small Causes Court against the present plaintiff and other defendants he subsequently deleted the name of the

present plaintiff and ultimately obtained decree by misleading the Court and suppressing material facts. So, at this state it is not at all necessary to go into the question of the legal rights between the plaintiff and the defendant no.4 vis-a-vis original tenanted premises.

18. The next question which falls for consideration is to whether the order with regard to status quo order passed in plaintiff's suit No.4993 of 2004 was revived after the Notice of Motion was revived.

19. The learned Advocate for the plaintiff submitted that as the Notice of Motion was restored the order passed in the same with regard to the status quo stood restored. In support of this proposition he has placed reliance on a case reported in AIR 1956 Patna 271 wherein it has been held that the orders like one for stay are nothing but ancillary orders and they are all meant to aid and supplement the ultimate decision arrived in the main suit or appeal. So, once the dismissal order is set aside and the suit or appeal is restored then since that date necessary legal implications of the said order follow. The learned Advocate for the plaintiff has also drawn my attention to a case Nandipati Rami Reddi and Ors. V/s Nandipati Padma Reddy and Ors. AIR 1978 AP 39> wherein also it has been held that

the restoration of the suit which was dismissed for default revives the interlocutory orders passed in the suit prior to dismissal. While considering this question a useful reference an also be made to Gurudwara Takshal Sangat V/s Dost Mohd (1992-1) 40 BLJR 83 wherein it is observed that "where a suit dismissed in default is restored, the operation of all interlocutory orders passed in the suit revived effective from the date of dismissal". So, considering the above position of law, it must be noted that after the above mentioned Notice of Motion was restored the earlier order with regard to the status quo also revived. However, admittedly the defendant no.4 never brought this to the notice of the Court which passed decree in RAD Suit No.419 of 2005. So to that extent he certainly suppressed the material fact from the Court. Not only that but even at the time of execution, the defendant no.4 even obtained the possession of all 3 rooms admeasuring about 440 sq.ft. though in fact the decree was only for 220 sq.ft. So, by suppressing the material facts and misleading the Court, he practically took the possession of about 440 sq.ft. which was highly objectionable and improper. So, considering these peculiar facts, the learned trial Judge has rightly observed that this is a fit case where the interim relief though it is in nature of mandatory injunction has to be granted. I do not think that the order

passed by the learned trial Judge is arbitrary or capricious. So, under such circumstances there is no necessity for this Appellate Court to interfere with the said order.

19. In this view of the matter there is no substance in the present appeal. Hence I pass the following order :-

ORDER

. The appellant to vacate the suit room and restore the position regarding possession mentioned in the order dated 27-10-2004 and parties to the suit to maintain status quo with regard to the possession as mentioned in the order dated 27-10-2004. The present Appellant original defendant no.4 to vacate the premises accordingly by the end of this month.

. Parties to act on the copy of this order.

(S.R.SATHE,J.)